a character interfering little, if at all, with the ordinary pursuits of life. The points to be ascertained in such case are

1. What is the special hallucination entertained? what its peculiar nature and character? what its range of object, and the limits within which it operates?

2. How does the hallucination affect the ordinary business pursuits of life? Does it so absorb the action of the mental faculties as to prevent them from being sufficiently occupied in the plans and purposes of life? Is it of a character to lead to profitless investments of capital? Does it in any way tend to interfere with life's ordinary avocations so far as to prevent them from being reasonably followed and attended to? Does it render the party incapable of managing his own affairs, so far that they are likely to suffer materially in consequence of it? If so, the inquisition should return him a lunatic. But if it be of a character such as little, if at all, affects his ordinary business; leaving him, for all business purposes, the self-direction of his affairs, he may still be left in the possession of his own property, allowing his own volition to stand as a reason for his actions. A. D.

JURY TRIALS.

RIGHT TO DISCHARGE FOR DISAGREEMENT; EFFECT OF DISCHARGE, IN CRIMINAL CASES. THE ALLEGED PRACTICE OF CARTING JURIES, IN ENGLAND, QUESTIONED BY LORD LYNDHURST. THE AMERICAN AND ENGLISH CASES CONSIDERED.

The question has lately been raised in England in regard to the effect of discharging the jury, in criminal cases. This subject was much doubted and discussed, at the American Bar, not many years since, but, of late, there seems to have been a pretty general acquiescence in the right of the courts to discharge juries, in their discretion, and we are not aware that any distinction has obtained of late, in regard to the right to exercise that discretion, in ordi-

nary criminal, as well as in civil causes. The distinction may have been urged, at the bar, in argument, and it may have been adopted by the courts, in some cases; but we have no such in mind. In the following cases, the discharge of the jury in a criminal case is held to be matter of discretion with the court: *The People* vs. *Green*, 13 Wendell 55; *People* vs. *Denton*, 2 Johns. Cas. 275; *People* vs. *Olcott*, Id. 301; *Hector* vs. *State*, 2 Miss. R. 166. We shall recur to this point again.

But the English courts, of late, have had this matter more than once under consideration, and the views there entertained seem to be somewhat at variance with the general practice in this country, as stated above. In *Regina* vs. *Charlesworth*, 1 B. & S. 460, where the respondent was indicted for bribery at an election for member of parliament, at the trial before HILL, J., the principal witness for the crown refused to give evidence, and was committed for contempt of court. The counsel for the crown moved the judge to postpone the trial and discharge the jury, as it was impossible for them to proceed, without the testimony of the witness now committed for refusal to testify. The motion was opposed, on the ground that the court had no such discretion. HILL, J., after consulting with KEATING, J., said he had determined to discharge the jury, and postpone the trial, and should place the fact, with the reason for it, upon the record; that it might be determined, whether he had such power, and added, "If he had the power, he ought to exercise it, where a witness had wilfully tampered with the ends of justice." A rule for discharging the respondent having been obtained, it was argued at very great length by several counsel on each side, and a large number of authorities, both ancient and modern, many of them of the most conflicting character, were cited. The judges of the King's Bench took time to consider, and ultimately delivered judgments, seriatim, and of a very elaborate character.

Upon the general question of the effect of the judge discharging the jury, in a case of misdemeanor, improperly, and against the will of the respondent, after the trial had begun, the court came to the conclusion, that it did not entitle the respondent to be dis-

charged also, as upon a virtual acquittal. This would seem to be the only rational conclusion in regard to the question; the only wonder is, that, at this late day, it could have been brought so seriously in question before that court. But there is some ground of surprise, as it seems to us, that the court there should have considered that the exercise of such a discretion, in the particular case, was not warranted, "unless, perhaps, it could be shown that the absence of evidence," on the part of the prosecution, "was occasioned by collusion between the witness and the accused." This remark may apply, with considerable force, to the general right of asking to have the jury discharged, on the ground of the unexpected absence of a material witness, after the trial began; but if such defect of evidence was the result of causes wholly beyond the control of the utmost watchfulness on the part of the prosecution, as if a witness was suddenly smitten with severe sickness, coming into court, or waiting his turn, in court, or had gone out of court, in defiance of the subpœna, or, as in the case before the court, obstinately refused to give evidence; it would certainly savor of unwonted strictness and severity, to discharge the respondent, before it could be known what was the cause of the defect of evidence, or whether it was likely to be soon removed, or not.

The decision of the main question here is in accordance with that of the Central Criminal Court, in *Regina* vs. *Davidson*, 2 F. & F. 251. In the last case, which was an indictment for an indecent assault, the respondent pleaded, that he ought not to be further prosecuted, because he had been once tried for the same offence and the jury discharged. To this it was replied, on the part of the crown, "that the jury having deliberated for a long space of time, and being unable to agree, were discharged by the court in the exercise of its discretion." The court held the plea bad.

But in the trial of the case of *Regina* vs. *Charlesworth*, Crompton, J., made some very pertinent remarks in regard to a practice, which has become a serious cause of embarrassment in the administration of justice, upon both sides of the Atlantic, within the last

few years (1 B. & S. 523), as follows: "I think that the practice of discharging the jury, too soon, is objectionable. It is said they should be discharged, if the judge sees that they are not likely to agree. I think we should take some mean course. It is a dangerous thing to say that the jury should be discharged, in a certain time, or in a few hours. I think that they should be kept, not to coerce them, but for such a time, as that they should not be able to say, 'We need not agree in a verdict; we will wait for such a time and then we shall be discharged.' Therefore I do not reprobate the old practice of confining a jury for a reasonable time. Confining them without meat, drink, and fire, and exposing them to hunger, thirst, and cold, is a barbarous relic of ancient times, and should be got rid of. But I think they should be kept a reasonable time, so that they may not wait for their discharge, in order to avoid giving a verdict unpleasant to their feelings."

The question in regard to the effect of discharging the jury, in cases of felony and treason, seems not to have been settled in the English courts. But in the case of *Conway and Lynch* vs. *Regina*, 7 Irish Law Rep. 149, which was a case of felony, it was decided, three judges against one, that the discharge of the jury, by a single judge, in such a case, might be pleaded in bar to a future indictment for the same offence. But it seems to be the general voice of all the early law writers, in England, and the admitted tradition of the law, "that a jury sworn and charged in a capital case, cannot be discharged, (without the prisoner's consent,) till they have given a verdict. And notwithstanding some authorities to the contrary in the reign of King Charles II., this hath been held for clear law, both in the reign of King James II. and since the revolution:" 2 Hawk. Pl. Cr. Ch. 47, § 1; Co. Litt. 227 b; 3 Inst. 110. And by some of these ancient authors the same rule is extended to all felonies. What is here intended by "charged" refers to the committing the prisoner to the jury for trial, which was, and probably is now, done in a formal manner, in the English courts, at the beginning of every trial for felony, and has no reference to the summing up of the judge. But Lord Hale, 2 H. Pl. Cr. 294, 295, lays it down, as every day practice in the

English courts, to discharge the jury, after the trial had advanced so far as clearly to indicate to the court, the atrocious guilt of the prisoner and the probable existence of further evidence, showing such guilt; and order a trial at a future term. 3 Bac. Ab. tit. "Juries," Letter G. 769.

We have before incidentally alluded to the American rule upon this subject, that in ordinary criminal cases, not above the grade of misdemeanor, it rests in the sound discretion of the court when they will discharge the jury, and order a new trial, either immediately or at a future term. These questions have often arisen in regard to discharging a single juror, who was disqualified from further acting in the case, either on account of some disability occurring during the trial, or of one existing but not brought to the knowledge of the court, before the juror was impannelled. This was so ruled in *People* vs. *Damon*, 13 Wendell 351. This was questioned in *Garrat* vs. *Garrat*, 4 Yeates 244, and in *State* vs. *Williams*, 3 Stew. 454. And in *Hines* vs. *The State*, 8 Humph. R. 597, it is decided, that if the court discharge a single juror after he has been designated for the trial of a criminal case, without legal grounds, the respondent will be entitled to a *venire de novo*. But this may be legally done, on account of physical inability in the juror to act in the trial: 6 Humph. R. 249.

But many of the American courts hold, that in capital cases it is no sufficient ground for discharging the jury, without the consent of the respondent, that the jury are unable to agree upon a verdict; and that if the jury is so discharged, it is a bar to any further prosecution for the offence: *Commonwealth* vs. *Clue*, 3 Rawle 498; *State* vs. *Ephraim*, 2 Dev. & Batt. 162; *Commonwealth* vs. *Cook*, 6 S. & R. 577; *Williams's Case*, 2 Grattan 567.

Many of these cases, however, hold that where there is an invincible necessity for discharging the jury, a necessity which may fairly be said to be beyond and above the control of any mere human agency, both in its inception and its progress, and which precludes absolutely the attainment of a verdict, the jury must be discharged, even in capital causes, and that such discharge is no bar to further prosecution for the same offence: *Commonwealth* vs.

Clue, supra; State vs. *Ephraim, supra.* In this last case, RUFFIN, C. J., said: "The jury cannot be discharged without the personal consent of the accused, but for some evident, urgent, overwhelming necessity, arising from matter accruing during the trial, and which was beyond human foresight or control; and, generally speaking, such necessity must be set forth in the record: *Spier's Case*, 1 Dev. 491, in which TAYLOR, C. J., says, "That all the exceptions ought to be confined to those cases of extreme and positive necessity which are dispensed by the visitation of God; and which cannot by any contrivance of man be made the engines of obstructing that justice, which the safety of all requires should be done to the state." In *Commonwealth* vs. *Clue, supra*, GIBSON, C. J., said: "The court may discharge the jury of a prisoner capitally indicted, only in case of absolute necessity, to establish which it is necessary that there be some other ingredient beside mere inability to agree." In the case of *United States* vs. *Haskell and Francois*, 4 Wash. C. C. R. 402, it is held, that insanity in one of the jurors, appearing after the jury had been kept together three days, and more than twenty-four hours without refreshment, was good ground for discharging the jury in a capital cause, and that such discharge of the jury is in the discretion of the court, and is no bar to further prosecution. In this cause the grounds of the discharge of the jury were entered in form upon the record.

In the case of *United States* vs. *Perez*, 9 Wheaton R. 579, it is decided, that the discharge of a jury from giving a verdict in a capital cause, without the consent of the prisoner, the jury being unable to agree, is not a bar to a subsequent trial for the same offence. STORY, Justice, said: "The prisoner has not been convicted or acquitted, and may be again put upon his defence. We think, in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, as the ends of public justice would otherwise be defeated."

And in *The People* vs. *Goodwin*, 18 Johns. R. 188, it was decided, that in cases of felony or misdemeanor, if the jury, after

deliberating so long as to exclude all reasonable expectation that they will be able to agree in a verdict, "unless compelled to do so by famine or exhaustion," are discharged, it will be no bar to further prosecution for the same offence. In this case the jury had been out seventeen hours, and were discharged within half an hour of the time when by law the court was bound to close its session. In the case of *People* vs. *Green*, 13 Wendell 55, the same rule was applied to a similar case, except that the jury were discharged after one-half hour's deliberation, and when there was no restriction in regard to the time of adjournment of the court, it being regarded as a matter absolutely within the discretion of the court. The same view is taken in *Commonwealth* vs. *Bowden*, 9 Mass. R. 494. The jury here had "been confined together during part of a day, and a whole night, and returned into court and informed the judge, that they had not agreed upon a verdict, and that it was not probable they ever could agree." One of the jurors was accordingly withdrawn, and the panel discharged, and the prisoner tried again, by another jury, during the same term, and convicted, and the question came up on motion in arrest of judgment. And in *Commonwealth* vs. *Purchase*, 2 Pick. R. 521, on a capital trial, the jury were discharged, after a deliberation of eighteen hours, it appearing to the court that there existed a difference of opinion among them upon the evidence, which any further deliberation would have no tendency to remove, and it was held no bar to further prosecution, and the prisoner was subsequently tried and convicted of manslaughter, and it was held a good conviction.

It is well settled, in the American courts, that one cannot be said to have been put in "jeopardy of life or limb," within the meaning of the United States constitution, unless he has been either convicted or acquitted of the offence, so that the facts will constitute a good plea of *auterfois acquit*, or *auterfois convict*, which is only true, when there was both verdict and judgment shown: 4 Black. Comm. 335; 1 Chitty Crim. Law 372; WASHINGTON, J., in *United States* vs. *Haskell*, *supra*; SPENCER, C. J., in *The People* vs. *Goodwin*, *supra*.

The case of *United States* vs. *Coolidge*, 2 Gallison 364, is pre-

cisely the same case in principle, as the late English case of *Regina* vs. *Charlesworth, supra,* being a case of penalty or misdemeanor, and an indispensable witness for the prosecution being committed by the court for contempt, in refusing to give testimony, and the jury discharged, and the cause postponed. Mr. Justice STORY held, as HILL, J., did in the English case, that this was good ground for postponing the trial, and discharging the jury. On this point, it seems to us, the decision of these judges is more in consonance with reason and principle than that of the King's Bench, that it was not good ground for postponing the trial. But both decisions concur in the legal effect of such postponement, that it is no bar to further prosecution, being in the discretion of the court.

The American cases seem to agree in one respect, that a jury cannot be discharged, in a capital case, and ought not to be in any criminal case, except upon the strict ground of necessity. But there is not the same concurrence in regard to the matter resting altogether in the discretion of the court before whom the trial is had, and not being subject to revision upon errors. The English courts concur with the majority of the American courts, that the question of necessity is one of fact, and that the decision of the court before whom the question first comes is final. This seems to us the only practicable rule upon the subject. For the disagreement of a jury, which ought, we think, in all cases, civil or criminal, to be regarded as not being one of necessity for a discharge, until pushed to the utmost limit of reasonable hope, or until the jury become desperate, and incapable of further effort, without unreasonable pressure and constraint, may nevertheless become a cause of real, infallible necessity, as much as sickness or insanity; and it must then be treated in the same manner as any other necessity, and the court before whom the trial is had is the only proper tribunal to determine this necessity, and their decision cannot be reversed on error, because, in the nature of things, it is impossible to state all the facts and circumstances in the case, precisely as they appear in the court below. The discharge of the jury, therefore, in a criminal cause, ought not to be regarded as a bar to further prosecution, unless it appear clearly that it was for

insufficient reasons, and when no legal necessity existed in the case for such a course, as was held in *State* vs. *Waterhouse*, Mart. & Yerg. 278.

Some curious discussions have lately arisen in England and Ireland, in the cases already named, and in a debate in the House of Lords in which Lord Lyndhurst took part, in regard to the fact of the jury having even been *carted* about the circuit, as matter of indignity to them, by way of punishment for not performing their duty, as it has been alleged was done in ancient times in those countries. His lordship insists that no such thing ever occurred in England, although it is admitted to have occurred in Ireland within the memory of man, but that the tradition arose from the misconstruction of the abbreviation "en charr." which really meant a covered wagon instead of an open cart, and that the jury were carried along with the judge of the circuit, in the usual and most comfortable mode of travel in that day, in order to give them more ample opportunity to digest the case, and ultimately to come to an agreement! We have no confidence in these modern glosses upon ancient traditions. The text is far more reliable than the commentary. But all must rejoice that such a barbarous practice is not only discontinued, but that the disfavor with which it is now viewed is fast bringing the belief of its former existence into question.

We should venture to say more in regard to the policy of discharging juries in cases committed to them, both civil and criminal, after a short consultation, and the assurance of the foreman, that they will not be likely to agree, if we supposed it would be useful. We believe this practice to be a vicious one every way, and that it has done more than any one thing else, to bring jury trials into disrepute, in this country. And when it is considered that the law nowhere provides for any such thing as the discharge of a jury, for disagreement, and that the practice has grown up out of the necessities incident to that mode of trial, we must all feel, that such a practice, resting upon mere necessity, "which knows no law," should be carefully restricted within the narrowest limits possible. And we think the discharge of the jury ought not to be referred to the consent of the parties, exclusively, as was formerly

the practice in the American courts to a great extent. This practice enables the parties to control the business of the courts, in important particulars, in regard to which other suitors have an important interest. And it enables the parties to bid against each other in open court, often, for showing deference and indulgence to the opinions and feelings of the jurors, which is an undignified and unworthy practice, and one not to be encouraged. The judge should hold all these matters under his own control, and if he is fit for his place, he will do it, with a firm but gentle hand, so that the course of justice will be quiet and easy, but ever onward; so that it will soon come to be the feeling of every one about him that the business *must* be finished, and that it is just as likely to be well done, by the first jury, as any other, and that as the law has established this mode of trial, requiring the unanimous verdict of twelve men, it expects compromise and concession, and that such qualities of mind, instead of being evidence of mental imbecility, are more creditable on the score of wisdom and judgment, than that dogged obstinacy of opinion, which is more commonly the result of weakness, or inexperience, than of anything else. We do not believe there would occur the necessity of discharging a jury, one time in a thousand, if the courts had the capacity to make the bar, and the public, comprehend and feel, that such a result, instead of being creditable to any one, evinced great want of capacity in the jury as well as the court, and reflected no special credit upon the counsel. But as long as those concerned in the trial of causes are content with *trying* to try causes, and feel themselves in no manner discredited by such a result, by the failure to accomplish any good, the evil will be likely to continue. But if the evil should increase in the same ratio it has done for some years past, it would soon render jury trials unendurable, and drive them out of practice, as it already has done, to a great extent, in some localities. And this is a result which all well-wishers to the jurisprudence of the country should deprecate. For, with all its evils, the jury trial, even in civil actions, is an important security to the peace and good order of any country, so perfectly free from governmental constraint as America has thus far been.

I. F. R.